

STATE OF MICHIGAN

IN THE SIXTH CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STATE OF MICHIGAN

Plaintiff,

v

STEVEN LINDSEY MCBURNEY

Defendant

OAKLAND
COUNTY

07-214651-FC



JUDGE DANIEL P. O'BRIEN
PEOPLE v MCBURNEY, STEV

WALKER HEARING

BEFORE HONORABLE DANIEL PATRICK O'BRIEN

SEPTEMBER 26, 2007

* * * *

APPEARANCES:

Sarah Pope Starnes, Esq.
On behalf of the People

Robert White, Esq.
On behalf of Defendant

OAKLAND COUNTY CLERK
BY: DEPUTY COUNTY CLERK

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I N D E X

PAGE

WITNESSES-PEOPLE

OFFICER SOVIK

Continued Cross-Examination, by Mr. White.....05

Redirect Examination, by Ms. Pope-Starnes.....32

WITNESSES-DEFENSE

STEVE MCBURNEY

Direct Examination, by Mr. White.....38

Cross-Examination, by Ms. Pope-Starnes.....67

CLOSING ARGUMENTS

By Ms. Pope-Starnes.....88

By Mr. White.....94

By Ms. Pope-Starnes.....99

Pontiac, Michigan

TUESDAY, SEPTEMBER 26, 2007

* * * *

THE CLERK: The Court calls case number 07
214651 FC.

MS. POPE-STARNES: Good afternoon, Your Honor.
Sarah Pope-Starnes on behalf of the People.

THE COURT: Good afternoon.

MR. WHITE: Robert White on behalf of Steven
McBurney.

THE COURT: Good afternoon Counsel and good
afternoon, Sir.

Where were we?

MR. WHITE: We left off with my cross-
examination of Officer Sovik.

THE COURT: Officer Sovik, if you'd approach
please. It's another day and we'd ask you to please
raise your right hand to be sworn.

THE CLERK: **Do you swear that the testimony you
are about to give will be the truth, so help you God?**

THE WITNESS: I do.

THE COURT: You can have a seat there.

MR. WHITE: Your Honor, my client is
handcuffed. I asked the officer if they would
consider taking off one cuff so he could continue to

1 take notes and he said, 'It's up to you.'

2 THE COURT: It's up to the guys with a gun.
3 Is it against any regulations or if you don't mind,
4 if it's all right with the deputies.

5 THE OFFICER: It is a policy that we do not.

6 THE COURT: Okay.

7 THE OFFICER: Now if you would like us to undo
8 his hands we can take him down and put the shackles
9 on.

10 THE COURT: Mr. --- was he in the shackles
11 yesterday?

12 THE OFFICER: That I don't ---

13 THE COURT: (Interposing) You know what, Mr.
14 White? I'm not going to disrupt the policies of the
15 deputy's department. And if indeed that is the rule
16 it's going to cause for further delay. We'll
17 proceed right now as it goes. And if he has any
18 questions or whatever he can bring them to your
19 attention.

20 MR. WHITE: The delay is not ours.

21 THE COURT: What is the harm in ---

22 MR. WHITE: (Interposing) It's his case. He
23 should be able to take notes. He should be able to,
24 that's all there is to it.

25 THE COURT: All right. Well I'm yielding to

1 the deputy's policy, so we'll proceed. Thank you.

2 OFFICER SOVIK

3 WAS THEREUPON CALLED AS A WITNESS HEREIN, AND
4 AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH,
5 THE WHOLE TRUTH AND NOTHING BUT THE TRUTH WAS
6 EXAMINED AND TESTIFIED AS FOLLOWS:

7 CONTINUED CROSS-EXAMINATION

8 BY MR. WHITE:

9 Q Officer Sovik, we left off yesterday in conclusion of
10 Heather's interview. Heather was taken out of the
11 room by Regina Keynard (phonetic), correct?

12 A If you could refresh my memory as to what time, when?

13 Q At the conclusion of Heather's interview on December
14 3rd, 2006,

15 A (Interposing) Yes, Sir.

16 Q When you were in the pediatric intensive care unit,
17 4th floor, University of Michigan Hospital, Ann
18 Arbor, ---

19 A (Interposing) Yes, Sir. She was, yes.

20 Q Okay.

21 And --- and you and Officer Sederlund remained
22 in the room, correct?

23 A Yes, Sir.

24 Q And Sarah Weaver remained in the room, correct?

25 A I think for a short period of time, yes.

1 Q And then the next person to enter the room was Steven
2 McBurney, isn't that true?

3 A Yes, Sir.

4 Q And uh --- at the time he entered the room you turned
5 to Sarah Weaver and said, 'Do you need anything
6 else', isn't that true?

7 A It may have been. I don't recall.

8 Q And isn't it also true that she said, 'No, I have
9 everything I need'?

10 A Possibly.

11 Q It could have happened, you just can't remember?

12 A That's true.

13 Q Okay.

14 And then Sarah Weaver walked out of the room,
15 correct?

16 A Yes, Sir.

17 Q She was the Child Protective Services worker assigned
18 to this case, correct?

19 A Yes, Sir.

20 Q Okay.

21 And at that point you identified yourself to Mr.
22 McBurney, correct?

23 A Yes, Sir.

24 Q And Officer Sederlund did also?

25 A Yes, Sir.

1 Q And then you told him to take a seat, correct?

2 A We asked him to sit down.

3 Q Well what did you say?

4 A Well actually I don't even know if we asked him to
5 sit down. I think he just came in and sat down.

6 Q You didn't say, 'Take a seat'?

7 A I don't believe I did, no.

8 Q Did Sederlund?

9 A I don't think so, no.

10 Q And um --- the seat that he sat in was the same seat
11 that Heather sat in previously at the head of the
12 table, isn't that true?

13 A Yes, Sir.

14 Q And um --- then you began your interrogation, isn't
15 that true?

16 A My interview, yes, Sir.

17 Q More like an interrogation, you're asking questions,
18 correct?

19 A Yes, Sir.

20 Q Okay.

21 And Sederlund is asking questions too?

22 A Yes, Sir.

23 Q Okay.

24 And the purpose of asking questions was in the
25 course of your investigation of non-accidental

1 injuries to Madison McBurney, isn't that true?

2 A Yes, Sir.

3 Q I'll try not to speak so softly.

4 And this interrogation continued from
5 approximately two a.m. (2:00 a.m.), a little after,
6 correct?

7 A (No verbal response.)

8 Q Until after four a.m. (4:00 a.m.), correct?

9 A Yes, Sir.

10 Q And he was ultimately handcuffed and arrested,
11 handcuffed and escorted out of the hospital
12 approximately five a.m. (5:00 a.m.), isn't that true?

13 A Yes, Sir.

14 Q Okay.

15 Now all times from the beginning of the
16 interrogation to the time he was escorted out of the
17 hospital he was under your direct supervision, isn't
18 that true?

19 A What do you mean direct supervision?

20 Q He was either with you in your presence or he was in
21 that conference room and you were immediately
22 outside, true?

23 A That is correct.

24 Q Okay.

25 He went to the bathroom one time, correct?

1 A I don't ---

2 Q (Interposing) You escorted him to the bathroom?

3 A I never escorted him to the bathroom.

4 Q Okay.

5 And he was escorted one time to Madison's room,
6 correct?

7 A I didn't escort him.

8 Q Okay, you didn't do that either?

9 A No.

10 Q Okay.

11 But at all times you knew where he was, correct?

12 A He was sitting at the table with us.

13 Q At all times you knew where he was, is that true?

14 A No.

15 Q From the beginning of the interrogation until the
16 time he was escorted out of the hospital?

17 A I lost sight of him at one point when he went back to
18 Madison's room.

19 Q You didn't know where he was?

20 A No, I didn't.

21 Q You didn't have any idea?

22 A Well no. You're talking about like looking at him.
23 I did not see him the entire time.

24 Q I'm talking about did you know where he was?

25 A Yeah, he was on the fourth floor. I knew he was on

1 there somewhere.

2 Q And at that point you'd already made up your decision
3 you were going to arrest him?

4 A Yes.

5 Q Correct?

6 A Yes.

7 Q So you certainly weren't going to let him out of your
8 supervision and control, isn't that true?

9 A Yes.

10 Q So from that whole period of time, from the beginning
11 of the interrogation till the time he was escorted
12 out of the hospital, you never asked him his age,
13 isn't that true?

14 A No, I did not ask him his age.

15 Q So it is true, right?

16 A Yes.

17 Q Isn't it also true you never asked him his
18 educational level?

19 A I don't believe I did, no.

20 Q Now that's true also, isn't it?

21 A Yes.

22 Q Okay.

23 And isn't it also true that you never asked him
24 whether he was under the influence of any drugs or
25 alcohol?

1 A That's true.

2 Q Isn't it also true you never asked him about how much
3 sleep he had on the days before this particular
4 interrogation?

5 A That is true.

6 Q And also you didn't --- you never asked him how much
7 -- how long he had been in the hospital, correct?

8 A (No verbal response.)

9 Q Isn't that true?

10 A Correct.

11 Q You also asked him --- never asked him whether he was
12 under any disability, mental or emotional, isn't that
13 true?

14 A Sure.

15 Q You also never asked him whether he wanted anything
16 to drink or eat, isn't that true?

17 A That is correct.

18 Q Okay.

19 And during this whole process you also never
20 informed him of his Miranda rights at any time, isn't
21 that true?

22 A That is correct.

23 Q Any one of them, isn't that true?

24 A I didn't need to.

25 Q Isn't it true that you never informed him of any of

1 his Miranda rights?

2 A That is correct.

3 Q Okay.

4 And you know what those rights were at that
5 time, isn't that true?

6 A Yes.

7 Q Okay.

8 And you know what they are now, right?

9 A Yes.

10 Q You never informed him of his right to remain silent?

11 A I did not.

12 Q You never informed him of his right to have an
13 attorney, correct?

14 A I did not.

15 Q Never informed him of his right to have a Court
16 appointed attorney if he couldn't afford his own
17 attorney, correct?

18 A That is true.

19 Q You never informed him that if he did say anything,
20 what he said could and would be used against him in a
21 Court of law, isn't that true?

22 A True.

23 Q Okay.

24 And you never informed him at any time that he
25 was not under arrest, isn't that true?

1 A True.

2 Q You never informed him that he was not free to leave,
3 isn't that true?

4 A True.

5 Q You never informed him that he was free to leave
6 either, did you?

7 A Never asked.

8 Q Did you ever inform him that he was free to leave?

9 A No.

10 Q And you also never informed him that he was not in
11 custody, isn't that true?

12 A That is correct.

13 Q And you also never informed him that the door behind
14 him was unlocked?

15 A No, Sir.

16 Q You never informed him that he could consult with an
17 attorney, isn't that true?

18 A He never asked for one.

19 Q Do you understand the question?

20 A Try me again.

21 Q Did you ever inform him that he could consult with an
22 attorney?

23 A No.

24 Q Did you ever consult --- did you ever inform him that
25 he could consult with any doctor?

1 A No.

2 Q Did you ever inform him that he was going home that
3 night?

4 A No.

5 Q Did you ever tell him that he could make a phone
6 call?

7 A No.

8 Q Now um --- you asked him about Madison, correct?

9 A (No verbal response.)

10 Q His daughter?

11 A Yes.

12 Q You asked him about his marriage, correct?

13 A Yes.

14 Q You asked him about the events leading up to the nine
15 one call - the nine-one-one call (911), November
16 30th, correct?

17 A Yes.

18 Q And you were doing the questioning and Sederlund was
19 doing note taking?

20 A It was back and forth.

21 Q Okay.

22 A He was doing most of the note taking. I was asking
23 questions. Sederlund was also asking some
24 questions.

25 Q Okay.

1 And you asked --- and you brought up about
2 Nicholas Kennedy, isn't that true?

3 A Yes.

4 Q Okay.

5 And you asked how Nicholas Kennedy had sustained
6 skull fractures, isn't that true?

7 A Yes.

8 Q Okay.

9 And you made him aware that you were aware then
10 of the prior arrest and prosecution for First Degree
11 Child Abuse, correct?

12 A Yes.

13 Q And that you were aware also of his plea of No
14 Contest to second degree?

15 A Yes.

16 Q Okay.

17 Umm --- and you also made him aware that, in
18 your opinion, the injuries to Madison were the same
19 as the injuries to Nicholas, isn't that true?

20 A Yes.

21 Q Okay.

22 And um --- you also informed him that you had
23 evidence that the injuries to Madison were not
24 accidental, correct?

25 A Correct.

1 Q And that it was indicative of shaken-baby syndrome,
2 correct?

3 A Yes, Sir.

4 Q Okay.

5 And then you said after some further discussion,
6 'We know that you did it', isn't that true?

7 A Yes.

8 Q Okay.

9 And you said it on more than one occasion, isn't
10 that true?

11 A I may have.

12 Q Okay.

13 Do you know how many times you said it?

14 A I do not.

15 Q Okay.

16 More than five?

17 A I don't think so.

18 Q Less than five?

19 A I think so.

20 Q Okay.

21 And you said it because you believed it, isn't
22 that true?

23 A I was trying to uh --- yes, and I was trying to
24 elicit some more information from him.

25 Q Okay.

1 So at the point that you said this, 'We know
2 that you did it,' and said it several times, even
3 though you can't remember how many times, we know at
4 that point he had not made any statement, for
5 instance, that his life was over, correct?

6 A He had not made that statement, yes.

7 Q He had not made any statement that umm --- he got
8 frustrated?

9 A That's correct.

10 Q He had not made any statement that he got mad?

11 A At that point, no.

12 Q And he had not made any statement that he'd made a
13 mistake, isn't that true?

14 A Yes.

15 Q He had not made any statement that he threw the child
16 into the crib, isn't that true?

17 A Are you still up until that point?

18 Q Up until that point.

19 A Yes, he had not made any of those statements.

20 Q Okay.

21 And he had not made any statements about the
22 child screaming?

23 A Correct.

24 Q And he had not made any statements about the child
25 screaming in his ear?

1 A Correct.

2 Q And he had not made any statement that he threw the
3 child in the crib from two feet away?

4 A Correct.

5 Q And he had not made any statement about her head
6 hitting the bars or the spindles, isn't that true?

7 A Correct.

8 Q In fact he had not made any confession whatsoever,
9 correct?

10 A That is correct.

11 Q Okay.

12 It's only after that you told him on several
13 occasions that, 'We know you did it,' that Steven
14 McBurney made statements that you deemed to be a
15 confession, isn't that true?

16 A Yes.

17 Q Okay.

18 Umm --- now it was you who suggested that
19 Heather come back in the room, isn't that true?

20 A Yes.

21 Q Okay.

22 And umm --- Heather was brought back into the
23 room and umm --- the first thing that was said was
24 you saying, 'Don't you have something to tell
25 Heather', isn't that true?

1 A No, actually I think I addressed Heather first.

2 Q Okay.

3 And what did you say to Heather?

4 A I said, 'Heather', I said, 'Steven has something to
5 tell you.'

6 Uh --- I believe he said something like ---

7 Q (Interposing) I'm asking what you said.

8 A I said, okay. Umm --- I said, 'Heather, Steven has
9 something to tell you.' Umm --- 'He's going to tell
10 you he made a mistake.' 'He doesn't think that
11 you're going to continue to love and support him.'
12 'I told him that that was wrong.' Those were pretty
13 much the gist of what I said.

14 Q Okay.

15 And then at that point there was a discussion
16 between Steven and Heather, correct?

17 A Actually there was a short pause after I had said
18 that information to her.

19 Q Okay.

20 Umm --- after Heather was brought back into the
21 room and you made those statements, that's when
22 Steven said, according to you, 'I made a mistake',
23 correct?

24 A Eventually he said that, yes.

25 Q He said, 'I threw her into her crib', correct?

1 A Yes.

2 Q And he said, according to you, 'That it was
3 approximately two feet away', correct?

4 A Yes.

5 Q Screaming, crying, frustrated, mad. All those
6 statements were made after Heather was brought back
7 into the room, isn't that true?

8 A Yes, Sir.

9 Q And you were present during all those statements?

10 A Yes, Sir.

11 Q Okay.

12 And uh --- you deemed that a confession, those
13 statements, isn't that true?

14 A Yes, Sir.

15 Q Okay.

16 And umm --- at the conclusion of that particular
17 discussion you asked him to write a written
18 statement?

19 A Yes, Sir.

20 Q Okay.

21 And that written statement, I've got it here.
22 It's marked People's Exhibit 1.

23 MR. WHITE: If I may approach, Your Honor?

24 THE COURT: You may.

25 Q **(By Mr. White, continuing)** And you've seen that

1 before?

2 A Yes, Sir.

3 Q And, in fact, you saw it that night, true?

4 A Yes, Sir.

5 Q Okay.

6 And you asked Steve to write the statement and
7 you and Sederlund walked out of the room, correct?

8 A Yes.

9 Q And shut the door behind you?

10 A Yes.

11 Q Okay.

12 And you left your coat in the room?

13 A Yes.

14 Q Okay.

15 And that's when you called, actually Sederlund
16 called the duty Prosecutor, true?

17 A Yes, Sir.

18 Q Okay.

19 And you remained approximately two feet outside
20 that doorway, correct?

21 A Well I was outside.

22 Q Certainly Steven McBurney could not have left that
23 room without passing directly by you, correct?

24 A Well we were actually off to the left side. So he
25 may have just walked out and to the right if he

1 wanted to go out. We were on the left side of the
2 door.

3 Q Okay.

4 So you were going to just let him walk out?

5 A No.

6 Q Okay.

7 So you certainly had every intention in the
8 world to arrest him at that point, isn't that true?

9 A If he attempted to walk out of that room we were
10 going to stop him.

11 Q My question, Sir is, ---

12 MS. POPE-STARNES: (Interposing) Your Honor,
13 I object.

14 He's trying to answer the question. I ask that
15 he be allowed to finish answering the question.

16 THE COURT: If you're not finished, you can
17 continue.

18 Then you can follow up.

19 MR. WHITE: He's not answered the question,
20 Judge.

21 Q **(By Mr. White, continuing)** Isn't it true that ---

22 THE COURT: (Interposing) No. You'll get --
23 - you'll get --- go ahead with what you're saying and
24 then you can say the question again.

25 THE WITNESS: If Mr. McBurney would have walked

1 out of the room, we would have stopped him because we
 2 were still in the process of deciding what we were
 3 actually going to do with him. We were getting
 4 assistance from the Prosecutor. But I mean he
 5 wasn't going to be able to just walk out and go to
 6 the cafeteria or walk anywhere else. I mean when he
 7 came out of the room we were going to ---

8 Q (By Mr. White, continuing) (Interposing) So he
 9 was in your custody?

10 A Temporarily, yes.

11 Q Until when?

12 A Until we got off the phone with the Prosecutor.

13 Q So isn't it true that you had every intention of
 14 arresting him?

15 A Actually, no, not until we talked to the Prosecutor.
 16 I mean we --- Detective Sederlund and I didn't know
 17 what we were going to do after we got the confession.
 18 We called the Prosecutor to get some further
 19 assistance. Because if they would have said, 'Well
 20 you know what, don't arrest him', then we wouldn't
 21 have.

22 Q What question are you answering?

23 THE COURT: Come on. Let's move --- come on.

24 MR. WHITE: Well I mean it's not a free-for-
 25 all.

1 THE WITNESS: Your last question.

2 THE COURT: Let's move on.

3 Q (By Mr. White, continuing) Okay.

4 Umm --- and then you came back in the room and
5 the written statement was on the table, correct?

6 A Yes, Sir.

7 Q You had already formed the belief at that time, the
8 decision, that you were going to arrest him, correct?

9 A Yes, Sir.

10 Q Okay.

11 And you had a discussion about that written
12 statement, isn't it true?

13 A I had a discussion?

14 Q With Steven McBurney about that written statement?

15 A No, Sir.

16 Q You never had --- you never discussed it whatsoever?

17 A No.

18 Q In fact, didn't you tell him that you were --- that
19 he needed to add some language to that statement?

20 A No, Sir.

21 Q Did Sederlund do it in your presence?

22 A No, Sir.

23 Q Was that statement the way it is right now the same
24 way as it was the first time you saw it?

25 A I believe so.

1 Q Okay.

2 You didn't tell him to add the word Madison?

3 A No, Sir.

4 Q You didn't tell him to add the word seizure?

5 A I didn't have any discussion with him after he wrote
6 the statement. I never discussed --- no.

7 Q Now let me ask my question.

8 A No.

9 Q You didn't ask --- you didn't tell him to put the
10 word frustrated in there?

11 A No.

12 Q You didn't tell him to put the word mad in there?

13 A No.

14 Q In fact, you didn't tell him to put anything in
15 there, did you?

16 A I didn't.

17 Q Umm --- now who handcuffed him?

18 A You know I thought I did yesterday. I can't be
19 sure. I think I said yesterday that I did and we
20 handcuffed in the back but I --- I don't know who
21 handcuffed him but I know he was handcuffed in the
22 front.

23 Q Okay.

24 A I don't know who handcuffed him.

25 Q Handcuffed and escorted out of the police --- out of

1 the hospital, correct?

2 A Yes, Sir.

3 Q And escorted by you, Sederlund, and at least one
4 other security guard, correct?

5 A I believe so, yes.

6 Q Okay.

7 And that security guard is the same security
8 guard that brought you up to the pediatric intensive
9 care unit, isn't that true?

10 A Yes, Sir.

11 Q A tall, thin man, correct?

12 A Yes, Sir.

13 Q Was there more than one?

14 A Yes, Sir.

15 Q In fact, there was three, wasn't there?

16 A Yes, Sir.

17 Q And when was the first time that you saw the three
18 security guards? We know you saw the first one when
19 he brought you up to intensive care. What about the
20 other two? When is the first time that you saw
21 them?

22 A When he was handcuffed and escorted to the elevator.

23 Q Okay.

24 Did you call for their assistance?

25 A No, Sir.

1 Q Did Sederlund in your presence?

2 A No, Sir.

3 Q Did anybody in your presence?

4 A No, Sir.

5 Q Do you know how they got there?

6 A No idea.

7 Q Okay.

8 And as you were walking out there was a
9 discussion about football, do you remember that?

10 A I do not.

11 Q Okay.

12 And when Mr. McBurney was taken from the
13 hospital where did he go?

14 A To our vehicle.

15 Q To your vehicle?

16 A Yes, Sir.

17 Q And from the vehicle where did he go?

18 A To South Lyons Police Department.

19 Q And what happened at South Lyons Police Department?

20 A I believe he was processed.

21 Q What is processed?

22 A Booked. Fingerprinted. I believe that's what
23 happened.

24 Q What else?

25 A I left shortly after that.

1 Q Anything else besides fingerprinted?

2 A Do you mean photographed?

3 Q Yes.

4 A Possibly. I didn't do that so I'm just assuming
5 that's what happened.

6 Q Okay.

7 Were mug shots taken?

8 A I --- yes, I believe so.

9 Q Do you have those?

10 A I don't, no.

11 Q Are they here in your file today?

12 A I don't know. I don't believe we have them,
13 Counselor.

14 Q Do they exist?

15 A I believe so.

16 Q Who took the photos?

17 A I don't know. I could guess.

18 Q Go ahead.

19 A Sergeant Baaki or Officer Barbour, I believe. Those
20 were the two officers working that night, maybe
21 Officer Whitrock. One of those three.

22 Q Now you signed an affidavit in this case, Officer
23 Sovik, that --- and I assume that you've seen it?

24 A Yes, Sir.

25 Q In paragraph five it says, 'I did not use or possess

1 any recording device during the interview with Steven
2 McBurney'?

3 A Yes, Sir.

4 Q And is that a true statement?

5 A Absolutely.

6 Q Okay.

7 And umm --- then, 'I did not use or possess any
8 recording devices during my interview of any
9 witnesses involving the Madison McBurney homicide.'
10 Is that a true statement?

11 A Yes, Sir.

12 Q It said also, paragraph seven, 'That any notes I took
13 during the interviews of witnesses during the
14 McBurney investigation were destroyed after the
15 written police reports were completed.' Is that
16 true?

17 A Yes, Sir.

18 Q Remember when I asked you about the notes when we
19 were in front of Judge Mackenzie?

20 A Possibly.

21 Q And umm --- I asked you if you had your notes still
22 and you said, 'Yes.' 'They may be around the uh ---
23 the uh --- the police department?

24 A Mm-hmm.

25 Q Is that a 'Yes'?

1 A Yes.

2 Q Okay.

3 Remember that testimony?

4 A Yes.

5 Q Okay.

6 That was on April 27th of this year?

7 A Yes, Sir.

8 Q And you said, 'Sederlund's notes could be around the
9 police department also?

10 A Could be.

11 Q And now you're saying they're destroyed?

12 A Yes, Sir.

13 Q Okay.

14 And umm --- were they destroyed --- when were
15 they destroyed?

16 A Probably a couple of days after the investigation.
17 They weren't all destroyed all at one time. It just
18 kind of --- after we write the written report we take
19 the notes from the field notes, put them on the
20 report, check the report and get rid of them.

21 Q Okay.

22 So why didn't you tell me that on April 27th?

23 A I don't know.

24 Q Were you having a difficult time with your memory
25 that day?

1 A There's a lot of things I don't remember.

2 Q Pardon?

3 A There's a lot of things I don't remember.

4 Q Were you having a difficult time that day?

5 A I don't remember.

6 Q Now isn't it true, Officer, that you had a recording
7 device in that room during the interview of Heather
8 McBurney and Steven McBurney?

9 MS. POPE-STARNES: Objection. Asked and
10 answered.

11 THE COURT: I'll allow it.

12 THE WITNESS: Absolutely not.

13 Q **(By Mr. White, continuing)** Isn't it true that that
14 recording device was a camera that could record?

15 A Absolutely not.

16 THE COURT: I'll treat it as a standing
17 objection from the People, but I'll allow it.

18 Let's move on.

19 Q **(By Mr. White, continuing)** Okay.

20 Isn't it true that it's the same camera that you
21 used to take his mug shots?

22 A No. It's impossible.

23 Q Why is it impossible?

24 A Because I didn't have one. I didn't have one. I
25 didn't take any photos. I never had one at the

1 hospital with me.

2 Q Did you have any piece of equipment?

3 A No. None.

4 MR. WHITE: Nothing further, Judge.

5 THE COURT: Counsel.

6 **REDIRECT EXAMINATION**

7 **BY MS. POPE-STARNES:**

8 Q Describe the mug-shot camera used by your partner.

9 A The mug-shot camera is actually umm --- it's part of
10 the new computer system. It's mounted on the wall
11 in our booking room and then just kind of focuses
12 down and takes pictures of people we've arrested.

13 Q So it's permanently affixed to this system?

14 A Yes, Ma'am.

15 Q Is it portable?

16 A No.

17 Q That was the system that you used in December of two
18 thousand and six (2006)?

19 A Yes.

20 Q After the preliminary examination, did you go back
21 and check to see if there were any notes left in your
22 file?

23 A Yes.

24 Q Now you were asked some questions about whether or
25 not the Defendant was in your custody when you were

1 in the hallway.

2 At the point that you decided in your mind that
3 you were going to place him under arrest, did you
4 communicate that to the Defendant at that point?

5 A No.

6 Q You were asked questions about when you said to the
7 Defendant something about we know that you did it,
8 how did you say that to the Defendant?

9 A In a very calm, matter-of-fact, conversational, I
10 said, 'Listen, we know you're responsible for the
11 injuries to Madison.'

12 Q Why did you say that?

13 A We were taught in interview school that that's --- if
14 you can try and get on the same page as the substep -
15 -- subject, you can try to elicit more information
16 from them. Kind of get our common ground. You
17 know, I know, we know. Let's try and move on.
18 Give us some more information.

19 Q Why did you tell Heather McBurney and/or the
20 Defendant that these were the same injuries that
21 Madison had as Nicholas?

22 A Same injuries that Dr. Fleming talked about, the head
23 trauma. That was not accidental injuries, head
24 trauma.

25 Q Were you speaking directly about the skull fractures

1 that Nicholas had?

2 A Nah. I was speaking about the trauma to his head,
3 not accidental injuries.

4 Q When you talked to Dr. Fleming, did he talk to you
5 about a window of time between the time injuries are
6 received and symptoms being displayed by the child?

7 A Yes.

8 Q And what kind of window of time did he give you?

9 A He said on head trauma there's usually --- sometimes
10 symptoms don't or behaviors don't occur until twenty-
11 four (24) to forty-eight (48) hours after the injury
12 is sustained.

13 Q So you needed to find someone within twenty-four (24)
14 to forty-eight (48) hours of the nine-one-one (911)
15 call?

16 A Yes.

17 Q Did you have information about who was with Madison
18 during that twenty-four (24) to forty-eight (48)
19 hours?

20 A Yes. I ascertained that from Mr. and Mrs. McBurney.

21 Q Was it anyone more than just the Defendant?

22 A No. Oh. It was Heather McBurney.

23 Q You were asked questions about whether or not you
24 walked into Madison's room. And I believe that you
25 said you didn't.

1 Were you ever able to see into Madison's room?

2 A Yes.

3 Q How were you able to see?

4 A Her room's got a very large glass window in front of
5 it.

6 Q When you were on the pediatric intensive care unit
7 floor, did you check to see how many exits or
8 entrances there were?

9 A No.

10 Q Do you have any idea how many there are?

11 A No clue.

12 Q Were you drinking a Mountain Dew that night?

13 A No.

14 Q Was anyone?

15 A Yes.

16 Q Who?

17 A Steven.

18 Q You were asked questions about whether or not you had
19 taken notes of the statements or your interview with
20 the firefighters on December 2nd before you left umm
21 --- for the Northville Township Police Department and
22 the hospital.

23 Did you obtain written statements from the
24 firefighters?

25 A Yes.

1 Q When did you get those?

2 A That night.

3 Q When you first came into the station on December 2nd
4 and you spoke with, I believe it was Baaki, and you
5 talked to him about the fact that you had a case that
6 could possibly result in homicide, did you know who
7 had done that at that point?

8 A No.

9 MS. POPE-STARNES: I have no other questions.
10 Thank you.

11 THE COURT: Mr. White?

12 MR. WHITE: I have no further questions.

13 THE COURT: Thank you, Officer. You're all
14 set. You may be excused.

15 Ms. Pope-Starnes, the People rest?

16 MS. POPE-STARNES: No, thank you. I have no
17 other witnesses, Your Honor.

18 THE COURT: Mr. White?

19 MR. WHITE: Yes, Your Honor. We'd like to
20 call Mr. McBurney under **MRE 104** forseably as a
21 witness in this case without prejudicing his right to
22 take the fifth amendment to trial and not testify.

23 THE COURT: Okay. Noted. Thank you.

24 Deputies how do you want ---

25 MS. POPE-STARNES: (Interposing) Your Honor,

1 if I could just make it clear for the right --- the
2 record, of course it doesn't prejudice his right to
3 testify at trial but if he chooses to take the stand
4 at trial and testifies contrary to his testimony
5 here, the case law is clear that his testimony here
6 may be used against him to impeach him.

7 THE COURT: Yield to that law, Mr. White?

8 MR. WHITE: We understand the law.

9 THE COURT: Okay. All right. Thank you.
10 Deputies how do you want ----

11 THE OFFICER: (Interposing) What would you
12 like, Your Honor?

13 THE COURT: Can you use it without breaching
14 any policies; I don't want to do that. Can you
15 bring him up here?

16 THE OFFICER: Absolutely.

17 THE COURT: Okay. Yeah. Bring him on up.

18 Sir, obviously you are chained, as best as you
19 can, there you go, raise your right hand to be sworn?

20 **Do you swear --- go ahead.**

21 THE CLERK: **Do you swear that the testimony you**
22 **are about to give will be the truth, so help you God?**

23 THE WITNESS: I do.

24 THE COURT: Okay. Go ahead and have a seat up
25 here.

1 Thank you.

2 Mr. White.

3 S T E V E N M C B U R N E Y

4 WAS THEREUPON CALLED AS A WITNESS HEREIN, AND
5 AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH,
6 THE WHOLE TRUTH AND NOTHING BUT THE TRUTH WAS
7 EXAMINED AND TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. WHITE:

10 Q Please state your full name.

11 A Steven Lindsey McBurney.

12 Q How old are you, Mr. McBurney?

13 A Thirty-two (32).

14 Q And uh --- you are presently incarcerated?

15 A Correct.

16 Q Immediately before you were incarcerated where did
17 you live?

18 A 311 Scott Street in South Lyon.

19 Q And how long did you live there?

20 A About two years.

21 Q Who did you live there with?

22 A My wife and my daughter.

23 Q And your wife's name?

24 A Heather McBurney.

25 Q And your daughter's name?

1 A Madison McBurney.

2 Q And would you describe to the Court your educational
3 background? Did you graduate from high school?

4 A I graduated high school and I went to Ferris State
5 University for a year.

6 Q Okay.

7 Did you have any particular curriculum in that
8 year?

9 A No.

10 Q Did you ever receive a college degree?

11 A No.

12 Q Do you have any specific vocational training or
13 license?

14 A I don't.

15 Q Do you have any kind of effective certification?

16 A I don't.

17 Q Umm --- and immediately before your incarceration
18 were you employed?

19 A I was.

20 Q And where were you employed?

21 A S.M. Lawn Service.

22 THE COURT REPORTER: I'm sorry?

23 THE WITNESS: S.M. Lawn Service.

24 Q **(By Mr. White, continuing)** And umm --- what is the
25 nature of that business?

1 A Landscaping and lawn service.

2 Q And what was your position with the company?

3 A I was a crew leader for two lawn service crews.

4 Q Okay.

5 And how long had you maintained that employment?

6 A About five years.

7 Q Okay.

8 And any other significant employment other than
9 your job as a lawn service crew leader?

10 A No.

11 Q Okay.

12 And you were previously arrested?

13 A Previously?

14 Q Have you ever been previously arrested?

15 A Yes.

16 Q When was that?

17 A Nineteen ninety-eight (1998).

18 Q And was that arising from the incident with Nicholas
19 Kennedy?

20 A That's correct.

21 Q And you were charged ultimately?

22 A I was.

23 Q First degree Child Abuse?

24 A Correct.

25 Q And you pled No Contest to second degree Child Abuse?

1 A Correct.

2 Q If I could direct your attention to November 30th,
3 2006. Umm --- do you recall what day of the week
4 that was?

5 A It was a Thursday.

6 Q And do you recall what time of day --- what time of
7 that day you woke up?

8 A Six a.m. (6:00a.m.).

9 Q Did you --- were you at your house that day?

10 A I was.

11 Q At 311 Scott Street?

12 A Correct.

13 Q And did you remain at your house that day?

14 A Not for the whole day.

15 Q Okay.

16 Was there a time when you left your house?

17 A There was.

18 Q And approximately what time was that?

19 A Noon (12:00p.m.)

20 Q Okay.

21 And did you return?

22 A I did.

23 Q And was there another time that you left the house?

24 A When I had to go to the hospital.

25 Q Okay.

1 And approximately what time was that?

2 A Seven-thirty (7:30).

3 Q Okay.

4 How did you go to the hospital?

5 A In the ambulance.

6 Q Okay.

7 And the ambulance was transporting your
8 daughter?

9 A Correct.

10 MS. POPE-STARNES: Your Honor, I'm going to
11 object at this point. This is direct examination.
12 I'd ask that he not be using leading questions.

13 THE COURT: Sustained.

14 Q **(By Mr. White, continuing)** Okay.

15 And umm --- do you know what time that you got
16 to the hospital that night?

17 A Around eight (8:00).

18 Q Okay.

19 And what hospital was it?

20 A U. of M.

21 Q And when you got to the hospital what did you do?

22 A We --- the uh --- staff came out and got Madison and
23 Heather and I went inside and went into the ER.

24 Q Okay.

25 A And waited.

1 Q Did you remain at the hospital for the balance of
2 that night?

3 A Absolutely.

4 Q Okay.

5 Umm --- did you remain at the hospital up to the
6 point that you became --- that you were interrogated
7 by Sederlund and Sovik?

8 A All for two hours.

9 Q Okay.

10 When you say, 'All for two hours', when did you
11 leave the hospital?

12 A On December --- December 2nd, two-thirty p.m. (2:30
13 p.m.).

14 Q Okay.

15 And where did you go?

16 A I went home.

17 Q And how long did you stay there?

18 A Two hours.

19 Q Did you return to the hospital?

20 A I did.

21 Q Okay.

22 And did you sleep at any time while you were at
23 your house for those two hours?

24 A No.

25 Q Did you sleep at any time umm --- before the

1 interrogation by Sederlund and Sovik?

2 A About an hour-and-a-half before the interrogation.

3 Really none. No significant --- even a nap,

4 otherwise.

5 Q If I could direct your attention to immediately

6 before the interrogation, where were you?

7 A I was in Madison's room.

8 Q Okay.

9 And was Heather there?

10 A She was.

11 Q Okay.

12 Was there a time that Heather left the room?

13 A Shortly after midnight. Some time after midnight.

14 Q Okay.

15 And do you know why she left the room?

16 A I don't.

17 Q Okay.

18 Was there a time that she came back?

19 A She did.

20 Q Okay.

21 And do you know what time she came back?

22 A Around two (2:00).

23 Q Okay.

24 And umm --- did she say anything to you?

25 A No.

1 Q Did you say anything to her?

2 A No.

3 Q Was anything said to you?

4 A By the nurse.

5 Q Who --- and what nurse was that?

6 A Regina.

7 Q Okay.

8 And what did she say?

9 A She said, 'They want to speak to you now.'

10 Q Okay.

11 Did she --- could you describe her tone?

12 A Unfriendly. Uncharacteristic. We've --- we've
13 talked to her on different occasions and she was very
14 friendly to us.

15 Q That particular time?

16 A Unfriendly.

17 Q And when she said, 'They want to talk to you,' do you
18 know what she was talking about?

19 A I didn't know who they were.

20 Q Okay.

21 And did she direct you in anyway to where you
22 were going?

23 A She said, 'To the conference room, it's on the other
24 side of the nurse's station.'

25 Q Okay.

1 And did you go to that conference room?

2 A I did.

3 Q Okay.

4 And umm --- had you ever been in that conference
5 room before?

6 A No.

7 Q Okay.

8 Immediately before you went into that conference
9 room did you notice anything unusual?

10 A I sure did.

11 Q What did you notice?

12 A There was three officers of --- uniformed officers to
13 --- it would be to my left going into the room.

14 Q Okay.

15 And had you ever seen those officers before?

16 A No.

17 Q Could you describe what kind of uniforms they had on?

18 A Two were a brownish color and one was a light blue.

19 Q And umm --- did you see whether they had weapons?

20 A I didn't.

21 Q Did you see whether they had badges?

22 A They did. I don't know what kind.

23 Q Okay.

24 Umm --- and will you describe how they were
25 standing, Mr. McBurney?

1 A Shoulder to shoulder.

2 Q Okay.

3 And were they standing, obviously they had been
4 on the floor for some time?

5 A Yes.

6 Q Okay.

7 Did you know where the exit was from that floor?

8 A I sure did.

9 Q Okay.

10 Was there more than one exit or entrance to that
11 floor?

12 A There's one.

13 Q Okay.

14 And where were these police officers standing?

15 A They were standing at the intersection in the hallway
16 closer to the conference room.

17 Q Okay.

18 Could you have left that floor without passing
19 directly by ---

20 A (Interposing) No.

21 Q (Continuing) those police officers?

22 When you got in the conference room did you see
23 anybody in there?

24 A I did.

25 Q Who?

1 A Sederlund was on the left side of the table, Sovik
2 was on the right side of the table and Sarah Weaver
3 was in the back left corner.

4 Q Okay.

5 A Standing up.

6 Q Okay.

7 Had you ever seen Officer Sederlund before?

8 A No.

9 Q Had you ever seen Officer Sovik before?

10 A No.

11 Q Umm --- and I believe you said they were seated?

12 A They were.

13 Q Okay.

14 And Sarah Weaver was where?

15 A She was in the back left corner at the table
16 standing.

17 Q And had you ever seen her before?

18 A I have.

19 Q And when did you see her?

20 A December 2nd about six p.m. (6:00 p.m.).

21 Q Okay.

22 And where did you see her?

23 A I was coming back from making a phone call, heading
24 back to Madison's room and we ran into each other,
25 not physically but ...

1 Q Okay.

2 And umm --- did she make any statement to you?

3 A She did. She asked me if I was going to stay the
4 night at the hospital.

5 Q Okay.

6 And did you respond?

7 A I did.

8 Q Okay.

9 And your response was?

10 A I was definitely staying.

11 Q Did you know who she was at that point?

12 A I did.

13 Q Okay.

14 And who did you believe her to be?

15 A Child Protective Services.

16 Q Okay.

17 Did she have any kind of badge on?

18 A She did.

19 Q Okay.

20 Did you discuss the circumstances of Madison's
21 injuries at that time with her?

22 A No.

23 Q Okay.

24 Did you ever discuss the circumstances of
25 Madison's injuries with Sarah Weaver?

1 A No.

2 Q When you walked into the room and saw her standing
3 there, what was the first thing that was said?

4 A Sovik said to her, 'Is there anything else that you
5 need?

6 Q And what was her response?

7 A 'No, I think I have everything I need.'

8 Q And what did she do?

9 A She grabbed her belongings and left the room.

10 Q And umm --- had you ever had any contact with
11 Children's Protective Services before?

12 A Once.

13 Q And when was that?

14 A It was in nineteen ninety-eight (1998). I don't
15 remember the specific date.

16 Q And it was arising in what context?

17 A Uh --- an investigation into an abuse on Nicholas
18 Kennedy.

19 Q Okay.

20 And during that --- what was your contact with
21 Children's Protective Services in that case?

22 A It was in a conference room on that same floor, a
23 doctor, Child Protective Services, uh --- the mother
24 and myself.

25 Q Were you interviewed?

1 A We were.

2 Q Okay.

3 You were asked questions by the Protective
4 Services worker?

5 A Yes.

6 Q And the mother also?

7 A Yes.

8 Q And did you give responses?

9 A Yes.

10 Q Okay.

11 When Sarah Weaver walked out of the room saying
12 no, that she had everything she had, what did you
13 think?

14 A It was very shocking to me. I immediately thought
15 of the last case where I was questioned with the
16 mother and I wasn't being questioned at all.

17 Q Did you think, Mr. McBurney, at this point, that you
18 were free to leave that room?

19 A Yes.

20 Q And what was the first thing that was said to you?

21 A Uh --- Sovik identified himself and Sederlund as
22 Sergeant and Detective, respectively.

23 Q Okay.

24 And umm --- did they say anything to you about
25 where to sit?

1 A Sovik said, 'Have a seat'. And he kind of motioned
2 in --- there was only one seat available when I
3 walked in.

4 Q That was where?

5 A At the head of the table.

6 Q Okay.

7 And where were you positioned in respect to the
8 door?

9 A I had my back facing the door.

10 Q Okay.

11 Was the door open or closed?

12 A It was open when I went in and it was closed after
13 Sarah Weaver left.

14 Q Who closed it?

15 A Sederlund did.

16 Q And what was the first thing said when you sat down?

17 A They identified themselves.

18 Q Okay.

19 And after the identification of them as police
20 officers?

21 A The very first thing he asked us about our marriage
22 and uh --- was Madison our only child. And then he
23 said, 'Tell me about Madison.' 'Tell me a little
24 about her.'

25 Q And did you do that?

1 A I tried to.

2 Q Okay.

3 And when you say you tried to, what happened?

4 A I was, you know, talking about her and he cut me off
5 and said, 'Tell me about the events on November
6 30th.'

7 Q Okay.

8 And what was your response to that?

9 A I did so.

10 Q And umm --- umm --- did there come a time when there
11 was any discussion about Nicholas?

12 A There was.

13 Q Okay.

14 And who brought up Nicholas?

15 A Sovik did.

16 Q What was the question that was asked of you?

17 A Do you have another child? Do you have a son?

18 Q Okay.

19 And umm --- anything else that he stated about
20 this case?

21 A He informed me that he knew about the charge and that
22 I had pled No Contest to a lesser charge.

23 Q Okay.

24 Anything else that he said about the case?

25 A Umm --- actually yes. He asked me about the

1 injuries.

2 Q Okay.

3 And what did he --- how was that framed? What
4 was that question?

5 A Do you know how the injuries happened to him?

6 Q Okay.

7 And umm --- did he make any comparison between
8 Madison's and Nicholas's symptoms?

9 A A little later. Not at that point.

10 Q Okay.

11 And what was the comparison being made?

12 A That they were the same injuries.

13 Q Okay.

14 And the statement, 'Those were worse,' whose
15 statement was that?

16 A Sovik.

17 Q Was it your statement?

18 A No.

19 Q Umm --- what after the discussion about Nicholas,
20 what was the next topic of discussion? What was the
21 next question that you were asked by the officer?

22 A He told me that the injuries were the same and then
23 it became accusatory at that point. 'We know you
24 did it.'

25 Q Was there any discussion about Madison's injuries

1 being non-accidental?

2 A Yes.

3 Q Okay.

4 And was this the first time that you had heard
5 any of that accusation?

6 A Yes, it was.

7 Q Okay.

8 And who said that Madison's injuries were non-
9 accidental?

10 A I believe it was Sovik.

11 Q Okay.

12 And what was your response?

13 A I was really shocked by that because I had never
14 heard that up until that point.

15 Q Okay.

16 And did you --- did you make a verbal response
17 to Sovik?

18 A I asked to speak to her doctor.

19 Q Okay.

20 And what was the response?

21 A 'No.'

22 Q And did you make any further requests to speak to
23 Madison's doctor?

24 A Yes, I did.

25 Q And what was the response.

1 A 'No.'

2 Q Okay.

3 And whose response was that?

4 A I believe it was Sovik.

5 Q Okay.

6 At this time Mr. McBurney, who's asking the
7 questions?

8 A Sovik said pretty much everything up until that
9 point.

10 Q Was he taking any notes?

11 A He was not.

12 Q Okay.

13 Was Sederlund taking any notes?

14 A Yes, he was.

15 Q Okay.

16 And after you asked for his doctor ---- to speak
17 to Madison's doctor several times and it was
18 declined, what was the next thing that came out of
19 Sovik's mouth?

20 A 'Look.' 'We know you did it.' 'That you're
21 responsible for her injuries.'

22 Q And at that point did you believe that you were free
23 to leave that room?

24 A Absolutely not.

25 Q When Sovik said, 'Look, we know that you did it', did

1 he say it more than once?

2 A Throughout the rest of the interrogation it was said
3 repeatedly.

4 Q Okay.

5 Do you know how many times he said it?

6 A Not exactly.

7 Q Okay.

8 Was it more than five?

9 A I believe so.

10 Q Okay.

11 Whose suggestion was it to bring Heather into
12 the room?

13 A I had asked for her a couple of times but Sovik did
14 say, 'Would you like to speak with her?'

15 Q And umm --- when Heather was brought back into the
16 room, what was the first statement that was made?

17 A Sovik said to her that they had been talking to me
18 and that Steven --- or that I wanted to tell her some
19 things.

20 Q Okay.

21 And did Sovik make any other statements?

22 A Not at that point.

23 Q Okay.

24 Now --- and then there was discussion between
25 you and Heather?

1 A Yes.

2 Q Okay.

3 At some point did umm --- Sederlund and Sovik
4 leave the room?

5 A They did.

6 Q Okay.

7 And when they left the room did you know where
8 they went?

9 A They were outside the room.

10 Q Okay.

11 When they left the room do you believe that you
12 were free to leave at that point?

13 A No.

14 Q At any time after he said initially, 'We know that
15 you did it', did you ever believe that you were free
16 to leave the hospital under your own free will?

17 A No.

18 Q Did you believe that you were going to be arrested
19 and taken from the hospital?

20 A Most definitely.

21 Q Okay.

22 And umm --- you said, 'Sederlund and Sovik were
23 right outside the room.' Could you hear them?

24 A I could hear voices.

25 Q Okay.

1 And was there a discussion between you and
2 Heather?

3 A There was.

4 Q Okay.

5 Did you notice anything unusual in the room, Mr.
6 McBurney?

7 A Yes, I did.

8 Q What did you notice?

9 A There was a silverish device underneath Sovik's
10 chair.

11 Q Okay.

12 And had you seen that device before that ---
13 when Sederlund and Sovik had left the room?

14 A I noticed it when I walked in.

15 Q Okay.

16 And when you walked in what did you believe it
17 to be?

18 A A camcorder, a camera of some type.

19 Q Okay.

20 And when they left the room and you're talking
21 to Heather, did you have an opportunity to look at
22 that again?

23 A I --- I never touched it but I looked at it.

24 Q Okay.

25 What did you believe it to be?

1 A A camcorder, or a camera.

2 Q Okay.

3 Was there a discussion between you and Heather
4 about what that was?

5 A The very first thing Heather said when they left the
6 room was, 'You know we're being recorded, right?'

7 Q And did you believe that you were being recorded?

8 A I --- I --- it was reasonable to believe that, yes.

9 Q Okay.

10 Now you've had an opportunity to review the
11 police reports in this case?

12 A I have.

13 Q Prepared by Sederlund and Sovik?

14 A Yes.

15 Q Some of the discussion that you and Heather had
16 privately in that room before Sederlund --- I mean
17 while Sederlund and Sovik were gone, was that
18 included in the police report?

19 A Yes.

20 Q Okay.

21 That particular device, did you see it again
22 that evening?

23 A Yes, I did.

24 Q Where did you see it?

25 A At the police department.

1 Q And where at the police department?

2 A We went through a garage and into a --- a booking
3 area.

4 Q Okay.

5 A And that's where I saw it again.

6 Q And where was it when you saw it again?

7 A In Sovik's hands.

8 Q And what was he doing with it?

9 A He was holding it initially and then he took my
10 picture with it. Took two pictures of me, my face.

11 Q You heard his testimony a few minutes ago about the
12 device that was used to take your picture?

13 A Yes.

14 Q Is there any question in your mind that that
15 mechanical device, electronic device that was in the
16 room during your interrogation was the same device
17 used to take the picture?

18 A Is there any question that it ---

19 Q (Interposing) Any question?

20 A Not at all.

21 Q Now before Sederlund and Sovik left the room was
22 there any request made of you to provide a written
23 statement?

24 A There was.

25 Q Okay.

1 And was that request made right before they left
2 the room?

3 A It was.

4 Q Okay.

5 And was a pad, excuse me, was a piece of paper
6 and a pen provided to you?

7 A Correct.

8 Q And did you write out a statement?

9 A I did.

10 Q Okay.

11 And umm ---

12 MR. WHITE: If I may approach now, Your Honor?

13 THE COURT: You may.

14 Q **(By Mr. White, continuing)** I'm handing you People's
15 Exhibit 1.

16 Is that a copy of the statement you wrote out on
17 December 3rd, 2006?

18 A Yes, it is.

19 Q And it was approximately how long after the
20 interrogation began?

21 A Two and a half hours.

22 Q And umm --- it was done at the police officer's
23 request?

24 A That's correct.

25 Q And when you finished writing what did you do with

1 the paper that you wrote out?

2 A I just dropped it on the desk.

3 Q Okay.

4 A The table.

5 Q And at some point did Sederlund and Sovik come back
6 in?

7 A Actually I believe that Sederlund was the only one
8 that came back in at that point.

9 Q Okay.

10 Was there any discussion about your statement?

11 A He read it. And then he wanted me to add, he didn't
12 know who her was, so he wanted me to write Madison
13 above that.

14 Q He, him being ---

15 A (Interposing) Sederlund.

16 Q (Continuing) Sederlund.

17 Anything else he wanted to add?

18 A He --- he said I had to put in the information about
19 her having a seizure and that I called nine-one-one
20 (911).

21 Q Anything else that he wanted you to add?

22 A That was it.

23 Q When you --- I assume that you left the hospital?

24 A I did.

25 Q Okay.

1 And when you left the hospital you were taken
2 out of the conference room?

3 A Correct.

4 Q Were you handcuffed?

5 A I was.

6 Q Who handcuffed you?

7 A I believe Sovik did.

8 Q Okay.

9 And were you allowed to go to Madison's room?

10 A I was.

11 Q Okay.

12 And were you handcuffed at that time?

13 A No, I wasn't.

14 Q Okay.

15 And when you returned from Madison's room, umm -
16 -- where were you handcuffed, in the conference room
17 or outside?

18 A I was right outside the --- almost in the doorway,
19 but right outside the room.

20 Q Was that the first time that you had left the room
21 since your interrogation had begun?

22 A Yes, it is.

23 Q Okay.

24 When you came back out of the room did you
25 notice those three uniformed police officers?

1 A I sure did.

2 MS. POPE-STARNES: I'm going to object.

3 There's been no testimony there were police officers.

4 MR. WHITE: He testified that he believed they
5 were police officers.

6 THE COURT: Then --- then just rephrase that
7 who you believed to be police officers, is that
8 right, Sir?

9 THE WITNESS: I believed they were officers,
10 yes.

11 THE COURT: Go ahead.

12 MR. WHITE: Okay.

13 **Q (By Mr. White, continuing)** Umm --- and umm ---
14 where were they when you came back out of the room?

15 A Same location. A little closer to where I was
16 standing handcuffed.

17 Q Okay.

18 And when you were handcuffed what, if anything,
19 did they do?

20 A When I was handcuffed?

21 Q Yeah. Right after you were handcuffed.

22 A They were just standing there waiting for us to go.

23 Q Okay. Okay.

24 Did you exit the uh --- ward?

25 A Yes.

1 Q Okay.

2 And did those officers assist?

3 A Escorting us?

4 Q Yes.

5 A Yes, they did.

6 Q And any particular characteristic of any one of them
7 that you can recall?

8 A I remember one being really tall.

9 Q Were they Caucasian? Were they African-American?

10 A They were all Caucasian.

11 Q Were they male, female?

12 A All male.

13 Q Could you tell, Mr. McBurney, what particular entity
14 they worked for?

15 A I have no idea.

16 Q Whether they were a county sheriff, local deputy,
17 security guard?

18 A I don't know.

19 Q The time though that you saw them initially after you
20 saw them this time, you believed they were police
21 officers?

22 A Yes.

23 MS. POPE-STARNES: I'm going to object. This
24 is leading, Your Honor. This is direct examination.

25 THE COURT: Sustained.

1 Q (By Mr. White, continuing) Umm --- was there any
2 discussion as you were being escorted out of the
3 hospital?

4 A Yes, there was.

5 Q What was the discussion?

6 A College football.

7 Q Were Sederlund and Sovik involved in that discussion?

8 A At least one of them.

9 MR. WHITE: I don't think I have anything
10 further at this time.

11 THE COURT: Cross-exam.

12 **CROSS-EXAMINATION**

13 **BY MS. POPE-STARNES:**

14 Q Let's talk about your prior police contact.

15 Do you recall that?

16 A Yes.

17 Q You were interviewed by Detective Sumner from
18 Northville Township Police Department at your
19 apartment in Northville on March 2nd of ninety-eight
20 ('98) is that correct?

21 A Correct.

22 Q And after he interviewed you there he left, didn't
23 he?

24 A Correct.

25 Q You were not placed under arrest, were you?

1 A That's correct.

2 Q And subsequent to that, the same day, you went to the
3 police department later in the evening and spoke to
4 him, didn't you?

5 A That's correct.

6 Q And after you spoke with him and made a statement
7 about bouncing or shaking Nicholas too hard, he told
8 you that a warrant was going to be issued, correct?

9 A That's correct.

10 Q And you were allowed to leave the police station,
11 weren't you?

12 A I was.

13 Q You were not arrested until three days later on the
14 fifth of March, correct?

15 A I don't remember the exact day but it was at least
16 after that evening.

17 Q Now you testified that you never really had any other
18 substantive jobs besides this last one that you
19 testified about. Do you recall that?

20 MR. WHITE: I don't believe I asked that
21 question, Judge.

22 THE WITNESS: No, I don't.

23 MR. WHITE: I don't believe that was the
24 question. If that was the question I don't believe
25 that was the response.

1 THE COURT: What was the question?

2 MS. POPE-STARNES: I believe the question was
3 he testified about this lawn service job that he's
4 held for five years. And there was a question about
5 has that been the longest or the most substantive job
6 that he's had.

7 THE COURT: I'll allow it.

8 **Q (By Ms. Pope-Starnes, continuing)** In fact, Sir, the
9 time that you were booked by the Northville Township
10 Police Department, you told them that you were an
11 assistant supervisor at Home Depot, didn't you?

12 A That's correct.

13 Q And you told them that you'd held that position for
14 over two years, correct?

15 A That's correct.

16 Q Do you remember having a psychological evaluation for
17 a neglect case out of Wayne County?

18 MR. WHITE: Objection. This has no bearing on
19 this case, Judge.

20 MS. POPE-STARNES: It does. It's going to go
21 to a statement that he made during this hearing to
22 impeachment.

23 MR. WHITE: The purposes of this hearing it
24 doesn't have any relevance.

25 THE COURT: I'll allow it.

1 MS. POPE-STARNES: I'm laying a foundation,
2 Your Honor.

3 THE COURT: I'll allow it.

4 It will be subject to a motion to strike, Mr.
5 White.

6 Go ahead.

7 **Q (By Ms. Pope-Starnes, continuing)** Do you recall
8 having a psychological evaluation in a neglect case
9 that arose out of the incident with Nicholas Kennedy?

10 A I do.

11 Q And do you recall telling the evaluator that you did
12 have a specific program that you studied at Ferris
13 State?

14 A I don't.

15 Q Do you recall stating that you studied accounting for
16 two years?

17 A Two years where?

18 Q At Ferris State.

19 A I didn't attend Ferris for two years.

20 Q Did you study accounting?

21 A I took some classes for accounting.

22 Q So the answer is 'Yes'?

23 A Yes.

24 Q Now, in fact, Nicholas, his injuries were similar to
25 Madison's weren't they?

1 MR. WHITE: Objection, Your Honor. This has
2 nothing to do with this case, this hearing. Nothing
3 to do whatsoever.

4 MS. POPE-STARNES: It has been brought up
5 repeatedly by Counsel as to whether or not the
6 officers were asking him some leading questions about
7 whether or not the injuries were similar or not.

8 MR. WHITE: It goes to the state of mind of the
9 police and as it was being put into my client's state
10 of mind the question is whether he believed it was
11 reasonable to believe that he was in custody, okay?

12 It has nothing to do with the determination of
13 this Court. And I'm going to instruct him not to
14 answer, because what you're going to do is you're
15 going to incriminate him, okay?

16 THE COURT: I'll ---

17 MR. WHITE: (Interposing) You know where this
18 is leading.

19 THE COURT: All right.

20 The Court will overrule the objection. We'll
21 allow it to be inquired into. I understand your
22 argument. You can make further argument at the
23 closing and I'm going to limit it to the confines of
24 what this hearing is about in any event.

25 Go ahead.

1 MS. POPE-STARNES: Thank you.

2 Q (By Ms. Pope-Starnes, continuing) Do you recall the
3 question, Sir?

4 A I don't.

5 Q In fact, Nicholas injuries --- Nicholas's injuries
6 were similar to Madison's, weren't they?

7 A A little bit.

8 Q Well Nicholas and Madison both had cerebral
9 hemorrhaging, didn't they?

10 A Correct.

11 Q And they both had subdural hematomas, didn't they?

12 A That's correct.

13 Q Whose injuries were worse?

14 A Nicholas.

15 Q Except that Madison died, correct?

16 A That's correct.

17 Q Do you recall telling the officers that you didn't
18 think that you were Nicholas's father?

19 A Yes, I do.

20 Q But, in fact, you were named as the father in the
21 neglect case involving Nicholas, correct?

22 MR. WHITE: What does this have to do with this
23 case?

24 MS. POPE-STARNES: It goes to his credibility,
25 Your Honor.

1 MR. WHITE: He's already admitted that he told
2 --- he said, 'No.'

3 THE COURT: As it relates to pleadings filed by
4 others --- other people purporting him to be the
5 father, the Court will sustain the objection.

6 If you have some evidence that he has suggested
7 otherwise I'll entertain that at that time.

8 MS. POPE-STARNES: I'll rephrase it if I may,
9 Your Honor?

10 Q (By Ms. Pope-Starnes, continuing) Did you ever
11 contest the allegations that you were Nicholas's
12 father during the neglect case?

13 MR. WHITE: It has no relevance to the
14 determination of whether these particular statements
15 are admissible under --- it has nothing --- she is
16 impeaching him for the purpose as if a Jury was
17 there, Judge.

18 THE COURT: Your record --- your record is
19 noted. I'll respectfully overrule the objection.
20 This goes to credibility. The Court will limit it
21 accordingly.

22 } Go ahead.

23 THE WITNESS: I did not.

24 Q (By Ms. Pope-Starnes, continuing) Did you ever ---
25 did you have a medical condition during the time that

1 you spoke with the officers?

2 A Which officers?

3 No.

4 Q Detective Sov --- Sederlund and Sergeant Sovik.

5 A No.

6 Q You never complained to them that you were hungry or
7 thirsty, did you?

8 A No.

9 Q You never complained to them that you were tired, did
10 you?

11 A No.

12 Q You weren't under the influence of drugs or alcohol,
13 correct?

14 A I was not.

15 Q You testified that you went home on the twenty-second
16 (22nd) at two-thirty (2:30) for two hours.

17 What did you do at home?

18 A That was on December 2nd.

19 Q December 2nd, thank you.

20 What did you do at home?

21 A Showered and changed and grabbed clothes for my wife,
22 also.

23 Q Now you testified that when the nurse came into
24 Madison's room to get you that she said, 'They want
25 to talk to you,' and you didn't know who they were,

1 correct?

2 A Correct.

3 Q Did you ask?

4 A No.

5 Q Why not?

6 A I just went where I was told to go.

7 Q These uniforms that you saw when you left the room,
8 describe what they were wearing?

9 A Uh --- the two on the left were wearing brown pants,
10 brown shirt. The one on the right was wearing a
11 light blue shirt with a darker blue pants.

12 Q Were any of them wearing jackets?

13 A No, they weren't.

14 Q Did you --- what type of badges did you see?

15 A I don't know exactly. Shiny.

16 Q Where did you see the badges on them?

17 A On their chest.

18 Q What were these badges made of?

19 A They were shiny so I'm assuming metal.

20 Q Were they wearing gun belts?

21 A I didn't notice that.

22 Q Were they wearing radios?

23 A I don't recall that.

24 Q Were they wearing handcuffs?

25 A I didn't see any.

1 Q Any of them wearing a baton or asp?

2 A I didn't see that.

3 Q You testified that there was one exit and one
4 entrance to this floor, is that correct?

5 A Yes, there is.

6 Q How many days had you been on this floor?

7 A Three.

8 Q And what was this one exit and entrance?

9 A The hallway leading into the intersection that goes
10 into the PICU unit.

11 Q Stairs, elevator, escalator, what type of entrance or
12 exit?

13 A The elevator.

14 Q So it's your testimony that there was no stairwell
15 anywhere?

16 A I didn't see any.

17 Q Did you see fire signs showing exits?

18 A No, I did not.

19 Q When was the first time that you saw Sarah Weaver?

20 A December 2nd about six o'clock (6:00).

21 Q Did she introduce herself to you?

22 A She did not.

23 Q So it's your testimony that Sarah Weaver never
24 interviewed you?

25 A That's correct.

1 Q Is it also your testimony today that between the time
2 that Madison came to the hospital on November 30th
3 and the time these officers talked to you on December
4 3rd, that no doctor had talked to you about Madison's
5 injuries being non-accidental?

6 A Absolutely not.

7 Q Did you ask questions of the doctors of how Madison
8 could have sustained these injuries?

9 A I did.

10 Q And what was the response?

11 A There was many.

12 Q For example?

13 A Encephalitis, sepsis.

14 Q What doctor told you encephalitis?

15 A I don't recall the name. We talked to two
16 primarily, Dr. Owen and Dr. Steven Lieber (phonetic).

17 Q Did Dr. Owen or Dr. Lieber tell you encephalitis?

18 A I don't recall who told me.

19 Q Who told you sepsis?

20 A I don't recall. We spoke to many doctors.

21 Q Did Dr. Owen or the other doctor, Dr. was it Lieber?

22 A Yes.

23 Q Did either of them say it was sepsis?

24 A I don't recall.

25 Q Any doctors give --- tell you any other reasons for

1 Madison's injuries?

2 A I don't think so.

3 Q When a doctor told you about this encephalitis, was
4 your wife present?

5 A I don't --- I don't recall.

6 Q Your wife's a registered nurse, correct?

7 A That is correct.

8 Q When the doctor told you about sepsis, was your wife
9 present?

10 A I don't recall.

11 Q Now you testified that in the prior case you had
12 spoken to --- to someone --- you met with CPS and the
13 mother before in the same conference room.

14 Isn't it true that Nicholas was treated at
15 Children's Hospital and not at University of
16 Michigan?

17 A I said in a conference room.

18 Q Isn't it true Nicholas was treated at Children's
19 Hospital and not at University of Michigan?

20 A That's correct.

21 Q How many seats were at the table in the conference
22 room when you were with officers Sederlund and Sovik?

23 A How many seats? Eight to ten.

24 Q And how many seats did Officer Sederlund take up?

25 A One.

1 Q How many seats did Sergeant Sovik take up?
2 A One.
3 Q So that left more than one seat available for you,
4 didn't it?
5 A It would have been very difficult to get to any other
6 seat.
7 Q There were other empty seats, weren't there?
8 A Yeah. Yes.
9 Q And you were sitting the closest to the door in the
10 room, weren't you?
11 A Correct.
12 Q Did you ever ask to leave the room?
13 A I did not.
14 Q When the officers stepped out of the room, where did
15 you remain in the room?
16 A I was in my chair that I was in before. I had slid
17 over a little bit closer to Heather.
18 Q You stayed in the room?
19 A I did.
20 Q You stayed in the chair?
21 A Yep.
22 Q Your attention was focused on Heather?
23 A For the most part.
24 Q You wrote out the statement that was given to you?
25 A I did.

1 Q Isn't it true that when Heather came into the
2 conference room that the first thing that you and
3 Heather discussed was you asked her how she knew
4 about Nicholas Kennedy?

5 A Not true.

6 Q Isn't it true that she told you that she was aware of
7 Nicholas because she'd been told by your friend Kyle
8 some time ago?

9 A Not at that time.

10 Q Isn't it true you told her that you would have told
11 her earlier in your relationship but things were
12 going well and moving quickly and you didn't want to
13 ruin it?

14 A Not at that time.

15 Q This alleged recording device, did you ever ask the
16 officers about it?

17 A No.

18 Q Why not?

19 A I didn't care if I was being recorded.

20 Q Why not?

21 A It didn't bother me. I wish it would have been.

22 Q Why?

23 A Then there wouldn't be any discrepancy in what was
24 said.

25 Q What is the discrepancy in what was said?

1 MR. WHITE: Objection, Your Honor. This has
2 no relevance to your determination whether the
3 statements --- whether he was in custody. And
4 that's the sole determination you have to make. Not
5 what was said but whether he was in custody.

6 THE COURT: The whole scenario is necessary for
7 me to decide whether he was, in fact, in custody or
8 not.

9 The Court respects your objection but overrules
10 it.

11 THE WITNESS: The question again, please.

12 **Q (By Ms. Pope-Starnes, continuing)** I asked what ---
13 what was the discrepancy?

14 **A** The order of their report is inaccurate. The
15 statements that they include at the end of the
16 statement, they weren't in the room when they were
17 said. And there's details that they've included in
18 the statement that they said I said and I did not
19 say.

20 **Q** That are untrue?

21 **A** That is correct.

22 **Q** Which statements are untrue?

23 MR. WHITE: Objection, Your Honor. Objection.
24 This goes to the heart of the case.

25 MS. POPE-STARNES: Again, the totality of the

1 circumstances, Your Honor.

2 MR. WHITE: As to what's true and what's not
3 true ---

4 MS. POPE-STARNES: (Interposing) He is ---

5 THE COURT: (Interposing) One at a time,
6 Counsel.

7 MR. WHITE: Okay.

8 MS. POPE-STARNES: He is attacking the
9 credibility ---

10 THE COURT: (Interposing) No. Just a
11 minute. What's your objection.

12 MR. WHITE: My objection is it's not relevant
13 for the purpose of your determination, okay?

14 And you're asking him to incriminate him ---
15 she's asking him to incriminate himself. And that's
16 what not --- this is not what this hearing is about.
17 She's asking him what's true and what's not true.
18 She's asking him to incriminate himself and I'm going
19 to tell him not to answer because that has no bearing
20 on --- to your determination whether he was in
21 custody.

22 THE COURT: Why doesn't it have bearing? Why
23 isn't that the issue to be determined here? How can
24 I decide whether or not to suppress a statement if
25 it's contested whether the statement was made?

1 MR. WHITE: He didn't --- she didn't ask that.
2 She asked whether the statement was true.

3 THE COURT: That's just what I said.

4 Counsel, response?

5 MS. POPE-STARNES: My response is the Court has
6 to examine the totality of the circumstances. He
7 has said that part of what the officers have said he
8 said was untrue. And I asked what they have said or
9 purported that he said was untrue. This goes to the
10 credibility of this witnesses (sic), and attacking
11 the credibility of the police officers. And it goes
12 to the totality of the circumstances so the Court can
13 make a decision based on all of the evidence as to
14 whether or not the statement is admissible or should
15 be suppressed.

16 THE COURT: Anything in response ---

17 MR. WHITE: (Interposing) Are we trying ---

18 THE COURT: (Continuing) to that?

19 MR. WHITE: (Continuing) the case? Are we
20 trying the case?

21 THE COURT: Okay. All right. We are not in
22 the gate --- we are not in the business of rhetorical
23 questions. The Court has heard your objection.
24 I've heard your response. The Court finds it
25 germane to this issue. Respectfully overrules the

1 objection.

2 Q (By Ms. Pope-Starnes, continuing) My question was,
3 what did the officers report that you said that was
4 untrue?

5 A That I threw her from two feet away from the crib.
6 That I said, 'Screaming.' That I said, 'Mad.' And
7 that her head hit the bars, specifically.

8 Q Let's talk about your written statement. You said
9 that, 'Officer Sederlund told you to insert things in
10 the statement.' You have that right in front of
11 you, People's Exhibit 1.

12 A That's correct.

13 Q Isn't it true, Sir, that that statement follows
14 chronologically the things that you said happened on
15 November 30th, of two thousand and six (2006)?

16 MR. WHITE: Objection. Same objection.
17 Let's have a free trial. Let's have a free case.

18 THE COURT: Noted, your objection.

19 Sustaining objection, noted.

20 Continue.

21 MS. POPE-STARNES: I'm sorry, Your Honor.
22 You're sustaining the objection?

23 THE COURT: No. Sustaining objection. The
24 Court overrules it for the previous reason stated.

25 Go ahead.

1 THE WITNESS: Can you say it again?

2 Q (By Ms. Pope-Starnes, continuing) Yes.

3 Isn't it true the statement there (indicating),
4 People's Exhibit 1, is written in chronological order
5 of the events that occurred on November 30th, of two
6 thousand and six (2006)?

7 A Yes.

8 Q Now is it your testimony that Officer Sederlund told
9 you to insert the information about calling nine-one-
10 one (911)?

11 A Correct.

12 Q Isn't it true that the information about nine-one-one
13 (911) is the third to last statement, the third to
14 last line in this paragraph?

15 A It is.

16 Q And that's not written between any other sentences,
17 an extra little space in-between, is it?

18 A The sentence after that describes the procedure after
19 and as I had called nine-one-one (911) and that
20 completes the statement.

21 Q And that follows chronologically, doesn't it, with
22 what happened that day?

23 A It does.

24 Q Now you've testified that this silverish device that
25 you saw that was left in the room, how did it get out

1 of the room?

2 A Someone carried it out.

3 Q Did you see them carry it out?

4 A No.

5 Q Then how do you know it was carried out?

6 A Because he had it when we got to the station.

7 Q And where did he have it when you got to the station?

8 A In his hands.

9 Q Who booked you?

10 A Sovik did most of it and then it was turned over to
11 Officer Whitrock (phonetic).

12 Q And who took your booking photographs?

13 A Sovik did.

14 Q With that device?

15 A He did take pictures of me.

16 Q With the device he held in his hand?

17 A Yes, he did.

18 Q Do you recall seeing this computer, this mounted
19 camera in the booking room, that Sergeant Sovik
20 tested --- testified about?

21 A I remember seeing a computer.

22 Q And it's your testimony today your photograph was not
23 taken with that?

24 A I don't recall that, no. It may have been. I
25 don't recall that.

1 Q Now you're saying it may have been?

2 A It may have. I don't recall that.

3 Q When during the sequence of events was it that you
4 asked the officers if you could speak with Heather?

5 A It would be after I asked for a doctor and they told
6 me they knew I did it. There was a discussion about
7 um ---

8 Q (Interposing) Let me stop you there.

9 When did you ask for a doctor?

10 A I asked for a doctor after they told me the injuries
11 were non-accidental.

12 Q What doctor did you ask for?

13 A I asked for Madison's doctor.

14 Q Which was who?

15 A It was different every day. Every shift it was
16 different.

17 Q Who was it that evening?

18 A I don't know. We didn't speak to one at that
19 point.

20 Q Madison was in the pediatric intensive care unit?

21 A That's correct.

22 Q And in pediatric intensive care unit there is one
23 nurse assigned to one patient during the whole shift,
24 correct?

25 A During a shift? Correct.

1 Q And how many times during a shift did a doctor come
2 in and look in on Madison?

3 A At least once.

4 Q You never asked for a lawyer, did you?

5 A No, I didn't.

6 MS. POPE-STARNES: I have no other questions,
7 Your Honor.

8 THE COURT: Redirect.

9 MR. WHITE: I have no further questions.

10 THE COURT: Thank you, Sir. You're all set.
11 You can escort him back down.

12 MR. WHITE: We have no further witnesses, Your
13 Honor.

14 THE COURT: The Defense rests.
15 Any rebuttal from the People?

16 MS. POPE-STARNES: No, Your Honor.

17 THE COURT: Closing arguments.

18 **CLOSING ARGUMENTS**

19 **BY MS POPE-STARNES:**

20 Your Honor, the question here is not the
21 subjective beliefs of the police officers. I gave
22 to Court and to Counsel umm --- on Monday a
23 memorandum of law. And in that case I cited the
24 case of Stansbury (phonetic) versus California. And
25 I think it's a very interesting case factually, Your

1 Honor, because in that particular case the police are
2 investigating a homicide and they have one suspect.
3 And they interview the suspect and they believe that
4 that person is responsible for the murder.

5 And they bring in a second person who they
6 believe is a witness. And during the course of the
7 interview the person that they believe is a witness
8 he releases or gives to the police details that only
9 the person responsible for the murder would know.

10 And the officer begins to realize that this
11 person is the person responsible for the murder he is
12 investigating. And he continues to ask questions.
13 And he admits in his testimony during their hearings
14 that person's not pretty dull. He knows this is the
15 murderer. And he continues to ask questions and
16 gets more detail. And at some point leaves the room
17 and another investigator comes in and gives that
18 person Miranda. And then the Miranda rights are
19 invoked.

20 And in that case they contest the admissibility
21 of those statement --- statements, saying it is the
22 subjective view of the police officer that that
23 person is in custody and is not free to leave. And
24 therefore it's custody, custodial interrogation,
25 Miranda is invoked and those statements should not be

1 admitted.

2 And the United States Supreme Court said, 'That
3 is not correct.' The subjective view of the police
4 officers, the subjective view of the Defendant or
5 suspect is irrelevant. What is relevant is what the
6 officers communicate through word or through action
7 and the totality of the circumstances. And in that
8 case those statements are allowed.

9 In this case before the Court we have a
10 Defendant who has been interviewed by the police
11 before. And he knows in a prior case involving
12 similar circumstances, he's interviewed at his home
13 and a police officer leaves and he is not placed
14 under arrest. He goes to the police station later
15 that day and is interviewed and gives a statement
16 about shaking and bouncing the baby too hard. And
17 he's told that an officer is going to obtain a
18 warrant. And he admits he was allowed to leave the
19 station and was not placed under arrest.

20 There is no evidence in the totality of the
21 circumstances in this case that it was reasonable for
22 this Defendant to believe that these officers ---
23 that he was in custody, that these officers would not
24 allow him to leave. They brought his wife into the
25 room and let him speak to her. They left the room

1 and left him in there.

2 Both his written statement and his oral
3 statement should be admitted into evidence. Because
4 under the totality of the circumstances it is not
5 reasonable to believe that he knew that he was in
6 custody. That he did not have a reasonable belief
7 of that based on the evidence in this case.

8 Now, Your Honor, in regards to this whole
9 business about the credibility of this recording
10 device. With all due respect to Heather McBurney, I
11 think she was a grieving mother. She's not home.
12 She's at work. She gets called to the hospital.
13 And she testified here that she knew her daughter was
14 in critical condition and she was getting worse.
15 Her testimony was that she is a registered nurse.
16 She knew what was going on, Your Honor. She
17 testified that she'd gotten very little sleep over
18 those days. That she was upset. She testified
19 that at the point her husband made the statement that
20 he had thrown Madison into the crib she really
21 doesn't even remember what was said after that. She
22 even testified she doesn't remember anything about
23 this written statement.

24 I think that Heather McBurney, based on the
25 testimony that the Court heard, may think she

1 remembers that there was a recording device but she
2 doesn't really remember. Her memory is not a
3 hundred percent (100%) accurate about what happened.
4 She was in shock. Sergeant Sovik testified that
5 they had the nurse stay in the room that day because
6 they were concerned about how frail Heather McBurney
7 was.

8 It's interesting to note that what the Defendant
9 is arguing here is that the police officers are too
10 accurate in what they say, not that they've
11 misconstrued things. They were too accurate. They
12 only could've known this if they were in the room.
13 Both officers testified these statements were made
14 when they were in the room, that they did not have a
15 recording device. They didn't know what was being
16 said in there. They left them alone for a time
17 alone.

18 That action by the officers is consistent with
19 the consideration the officers gave the Defendant,
20 which he admits, that he was allowed to go to
21 Madison's room and to say goodbye to her.

22 I would submit to the Court that the testimony
23 of the Defendant is not credible. We are required
24 to show by preponderance of the evidence that the totality
25 of circumstances were such that this was a voluntary

1 statement and that the Defendant was not in custody.
2 Granted they did not give him Miranda but they did
3 not have to. It requires a custodial interrogation.

4 Were they asking him questions?

5 Yes.

6 Was this custody?

7 No.

8 And I would ask the Court to admit both the oral
9 statement and the written statement in People's
10 Exhibit 1. And I would encourage the Court to look
11 at People's Exhibit 1 and the Court can see there's
12 nothing inserted in here. This is written in a
13 chronological time frame.

14 THE COURT: Counsel, you can approach.

15 MS. POPE-STARNES: Thank you.

16 THE COURT: Mr. White is getting ready and you
17 can present me with your Exhibits.

18 Counsel, you can do the same.

19 MS. POPE-STARNES: That concludes my argument,
20 Judge.

21 THE COURT: Thank you, Counsel.

22 There's more Exhibits too. There's a jacket, I
23 think, and some other things. I better consider
24 everything. There'll all admitted so...

25 Go ahead Mr. White.

1 MR. WHITE: I think I just have A and B, Your
2 Honor.

3 MS. POPE-STARNES: Thank you, Your Honor.

4 THE COURT: Thank you.

5 Parties agree I have all the Exhibits now?

6 COUNSEL: (No verbal response.)

7 THE COURT: Great. They're now in Court's
8 possession.

9 MS. POPE-STARNES: You have the People's, yes,
10 Your Honor.

11 THE COURT: All right.

12 Mr. White?

13 MR. WHITE: I believe so.

14 THE COURT: Thank you.

15 MR. WHITE: Just briefly, Your Honor.

16 THE COURT: Go right ahead.

17 **CLOSING ARGUMENTS**

18 **BY MR. WHITE:**

19 I thank you for your patience in sitting through
20 this. You know the law and the totality of the
21 circumstances, what a reasonable person would believe
22 under the circumstances that presented themselves to
23 Steven McBurney on December 3rd, 2006, approximately
24 two o'clock (2:00 a.m.) in the morning to
25 approximately five o'clock (5:00 a.m.) in the

1 morning.

2 It's clear that there was one and only one
3 suspect from the time that Sederlund and Sovik left
4 the police department and that is the person who had
5 the prior conviction for child abuse, second degree.

6 That belief on their part was corroborated
7 throughout their investigation, specifically by Sarah
8 Weaver and Jeffrey Fleming. And there was no
9 intention to ever question Heather McBurney whether
10 she was involved in any injuries to Madison McBurney.
11 The sole focus of their inquiry was the criminal
12 responsibility of Steven McBurney.

13 And why is that important? Why is their
14 subjective belief important? Because it was
15 conveyed to Mr. McBurney. It was conveyed to him
16 repeatedly throughout the interrogation.

17 First of all, the question about Nicholas
18 Kennedy. This prior case, the injuries, the
19 circumstances of the plea and how the injuries
20 compared to Madison. Uh --- it was conveyed by the
21 police officers saying that they had evidence that
22 Madison's injuries were non-accidental. And it was
23 firmly conveyed by Sovik's statement to Mr. McBurney
24 that, 'We know you did it.' And that statement was
25 made repeatedly. So under Stansbury (phonetic) it's

1 true the subjective beliefs of the officers are not
2 relevant unless they are conveyed to the accused and
3 they certainly were in this case.

4 So before there's any statement that can be
5 construed as incriminating, Mr. McBurney was told in
6 so many --- in very clear language that we, the
7 interrogating officers, know you did it. Tell us
8 what happened.

9 So then, at that point, is it reasonable for Mr.
10 McBurney, who's testified that at that point he knew
11 he was not free to leave, was it reasonable, Judge,
12 for him to have that conclusion?

13 Uh --- yes, it was reasonable for him to have
14 that conclusion based upon his prior contact, based
15 upon his prior Child Protective Services interview,
16 in the other case when he was actually interviewed,
17 the mother and him together along with the doctor.
18 And in this case when he walks into the room for the
19 interrogation, the Child Protective Service worker
20 that he'd previously met, in so many words says, 'I
21 have --- I need nothing more.'

22 That means I have my mind made up. There's no
23 interview of Mr. McBurney. There's no questions of
24 Heather about any possible --- other possible
25 caregivers. There's no questions of Mr. McBurney

1 about any other responsible person. Is it
2 reasonable for Mr. --- Mr. McBurney when he said ---
3 when Sovik says, 'We know you did it', to believe
4 that he was in custody? Yes, it was.

5 And was it reasonable for him to continue to
6 believe that, as he did? Yes, it was because the
7 interrogation, the accusatory nature of the
8 interrogation continued throughout.

9 Under the totality of the circumstances, he was
10 in custody. There's no reason why Miranda should
11 not have been given from the beginning or at any
12 point along the line during this interrogation, Your
13 Honor.

14 And I direct your attention specifically to
15 People versus Coomer. It's at **245 Mich App 206**.
16 When in that case there was a, what police deemed to
17 be a confession, and then a request to have a written
18 statement. And that written statement was
19 suppressed because there was no Miranda and, in fact,
20 there was a confession. I believe that's
21 dispositive of the written statement in this case.

22 I'm going to ask you, Judge, to rule that at the
23 beginning of this interview there was no question it
24 was reasonable for him to believe it was for him ---
25 he was in custody. And certainly at the time that

1 they made the declarative form that he --- they knew
2 that he was responsible it was reasonable for him to
3 believe. The length of time that he had been at the
4 hospital, prior contact, CPS's involvement in the
5 case, lack of interview, I believe all those factors,
6 Judge, and the case actually cited by the Prosecution
7 is very helpful for determining the factors the Court
8 should consider. And all the factors point to ---
9 that this --- that these statements should be
10 suppressed.

11 There's no question there was no Miranda.
12 There's no question that he was never informed that
13 he was going to be free to leave, that he was not
14 under arrest, that --- that he was not in custody.

15 THE COURT: Do any of those cases indicate that
16 they have uh --- if not an outright express
17 responsibility but some --- some stretch of the
18 imagination suggests that they do have the
19 affirmative obligation to advise him, 'You're free to
20 leave,' or 'You're not under arrest'?

21 MR. WHITE: Uh --- I'm not saying that. It
22 goes to the point of the reasonable state of mind.

23 THE COURT: I'm with you. It's not anything -
24 -- you're arguing that this would lend itself more to
25 had they done that.

1 MR. WHITE: Right.

2 THE COURT: But it's not an express requirement
3 obviously?

4 MR. WHITE: Exactly. For instance, in People
5 versus Mays, **202 Mich App 181**, at the bottom of page
6 one-ninety (190),

7 "Although the police officer testified
8 that the Defendant was free to leave at
9 any time, there was no evidence that this
10 message was conveyed to Defendant.
11 These facts could support finding the
12 Defendant reasonably believe --- believed
13 he was not free to leave."

14 THE COURT: Right.

15 MR. WHITE: And again, who selected the time of
16 the interview? It's quite different from the prior
17 case. The police officer is who selected the place
18 of the interview, who selected who was present. All
19 these were conditions imposed upon my client.

20 So, Your Honor, I do believe People versus
21 Coomer says the written statement stays out. All
22 the cases, People versus Zahn (phonetic), People
23 versus Rourke, uh --- the Stansbury versus California
24 case referenced by sister Counsel, all support a
25 finding that he was in custody, certainly, at least

1 at the time when they said, 'We know you did it', and
2 then repeated it.

3 Thank you.

4 THE COURT: Thank you, Mr. White.

5 MS. POPE-STARNES: No, there is no case law
6 that says the officers have an affirmative belief to
7 say you're free to leave. And, in fact, one of the
8 things this case law talks about is, it is not
9 uncommon for police officers to get a confession, to
10 have enough to arrest someone and to let them leave,
11 to get a warrant at another period of time to
12 complete their investigation. And then, later have
13 the person arraigned. And that was this Defendant's
14 experience.

15 I cite in uh --- the memorandum of law,

16 "The police are not required to guess at
17 their peril the precise moment at which
18 they have probable cause to arrest a
19 suspect, risking a violation of the
20 Fourth Amendment if they act too soon
21 and a violation of the Sixth Amendment
22 if they wait too long."

23 Hoffa versus United States.

24 The fact that Sarah Weaver was present at one
25 point really isn't relevant. The Defendant said on

1 cross-examination when he met her the day before she
2 didn't introduce herself as a protective services
3 worker. So there is no evidence he knew a
4 protective services investigation was going on.

5 He talked about these people, these men,
6 standing shoulder to shoulder in the hallway. But
7 the officers testified they were brought up in the
8 elevator by one person, that he was wearing a
9 windbreaker. That --- and the Defendant said,
10 'These people weren't wearing any type of jackets.
11 The officer said, 'The same person that brought them
12 up was the same person that took them down.'

13 The officers testified there were no other
14 police officers there. There was a security person
15 that had to escort them to the floor because that's
16 how you got access from the elevators to that unit.
17 They never asked for police officer assistance.
18 They never asked for the security guard's assistance.

19 The Defendant said he doesn't know who these
20 people were. The police officers testified that the
21 person that they met was a security guard. And they
22 were asked repeatedly throughout their testimony,
23 could you see outside the window when you were out in
24 the hallway? Were any of the security people there?
25 And they said, 'No.'

1 The person sitting closest to the door during
2 this investigation is the person whose experiences
3 that after he admits some responsibility for an
4 action involving a child, he's allowed to leave.
5 The time ---

6 THE COURT: (Interposing) What's that last
7 part that you just said that the fact that ---

8 MS. POPE-STARNES: (Interposing) His prior
9 experience is that he's allowed to leave after he
10 admits some responsibility. That's this Defendant's
11 personal experience.

12 THE COURT: What relevance is that here?

13 MS. POPE-STARNES: Because it goes to his
14 beliefs.

15 THE COURT: But I thought it was objective,
16 thought it was objective, not his.

17 MS. POPE-STARNES: But in the total totality of
18 the circumstances it goes to that.

19 THE COURT: So did you ---

20 MS. POPE-STARNES: (Interposing) It talks in
21 the case law ---

22 THE COURT: (Interposing) Hold on. Let me
23 just ask you, am I on the right track? You're
24 saying it's an objective review but to determine the
25 objectivity you nevertheless look at the subjective

1 facts?

2 MS. POPE-STARNES: Yes. And the case law
3 talked about you can look at a suspect or Defendant's
4 prior experience with policemen. And that's why
5 it's relevant, to help the Court in making a
6 determination of the totality of the circumstances.

7 THE COURT: To determine whether something is
8 objective you can look at it subjectively.

9 Hey, I'm not arguing. If that's what the law
10 is that's what the law is.

11 MS. POPE-STARNES: You can look at the person's
12 personal experiences.

13 THE COURT: The particular person ---

14 MS. POPE-STARNES: (Interposing) Yes.

15 THE COURT: (Continuing) although I'm looking
16 at an objective perspective?

17 MS. POPE-STARNES: Yes.

18 THE COURT: So be it. Let the higher powers
19 speak.

20 Go ahead.

21 MS. POPE-STARNES: The Defendant wants this
22 Court to believe that just simply saying, 'We know
23 you did it,' is communicating to a person that they
24 are not free to leave. That they've communicated
25 that to the Defendant. That is not correct. The

1 test for custody is whether under objective
2 circumstances a reasonable person would believe that
3 his movement is restrained to a degree associated
4 with formal arrest.

5 The statement, 'We know you did it', doesn't
6 communicate you're under arrest. You are not free
7 to leave. I'm going to put you in handcuffs.
8 You're going to jail. It doesn't communicate that.

9 That's what the Defendant's arguing here. And
10 looking at the totality of the circumstances that's
11 not what was going on. His wife was allowed to come
12 into the room. The police left the room and left
13 them alone. It is not a reasonable belief that he
14 was not free to leave.

15 And again, there was no communication that he
16 was under arrest or in custody until after the
17 officers walked back in and saw that written
18 statement sitting on the table with a pen on top of
19 it. He'd already executed that statement. He'd
20 already made it.

21 So their subjective belief from when they're
22 standing out in the hallway and they've talked to the
23 duty Prosecutor and they say to each other, 'You know
24 what?' 'We better arrest him.' 'We don't know if
25 he's going to run.' 'We don't know if he might hurt

1 himself.' 'We think we're going to go in and arrest
2 him.' That statement's already made. It's already
3 done. It's admissible.

4 I would ask the Court not to suppress either of
5 the statements and to allow both into evidence.

6 THE COURT: Thank you, Counsel.

7 Well presented.

8 It's now twenty minutes to five o'clock (4:40
9 p.m.) and I appreciate the deputies willingness to
10 stick around but I don't want to rush to justice. I
11 will review these matters and you can take him back
12 down now.

13 Thank you, Deputies.

14 And I'd ask Counsel, I know, Mr. White, you're
15 on Dixie Highway aren't you?

16 MR. WHITE: No, I moved over to near ----
17 Tunuta's, Judge.

18 THE COURT: To where?

19 MR. WHITE: On Meigs.

20 THE COURT: Where's that?

21 MR. WHITE: It's about a mile and a half from
22 my old office.

23 THE COURT: Oh.

24 MR. WHITE: On Dixie Highway.

25 THE COURT: Okay. Okay.

1 Umm --- can you meet me in the office tomorrow?

2 MR. WHITE: I'll be here tomorrow morning in
3 front of Judge Warren.

4 THE COURT: Okay. You're in a jury trial so
5 we're just going to have to coordinate. Both of you
6 just check with us and we'll see because I'll try to
7 ---

8 MR. WHITE: (Interposing) I'll give your
9 clerk my cell phone.

10 THE COURT: All right. Very well. Then
11 we'll try to track you down.

12 MS. POPE-STARNES: I'll be with Judge Chabot.

13 THE COURT: And deputies --- you want your
14 client to be here I take it if I have a ruling
15 tomorrow?

16 MR. WHITE: Yes, Judge.

17 THE COURT: I can respect that. Can you uh --
18 -

19 THE DEPUTY: (Interposing) You want him to
20 appear tomorrow?

21 THE COURT: Bring him downstairs tomorrow and
22 then we'll ---

23 THE DEPUTY: (Interposing) Yes, Your Honor.

24 THE COURT: (Continuing) call him when we
25 need him.

1 THE DEPUTY: Okay.

2 THE COURT: All right.

3 Thank you, folks.

4 MR. WHITE: This is just a matter of
5 housekeeping. He doesn't need to be here. The
6 pretrial is scheduled for Monday. Could we have an
7 adjournment for one week?

8 THE COURT: Well let's --- we'll deal with that
9 tomorrow.

10 Okay?

11 MR. WHITE: Okay.

12 THE COURT: Thank you then.

13 MR. WHITE: Thank you.

14 THE COURT: Good night.

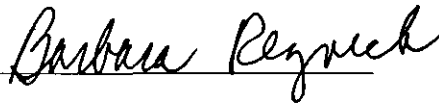
15 (Whereupon the matter was concluded.)

16 * * * *

STATE OF MICHIGAN)

COUNTY OF OAKLAND)

I, Barbara Reznick, Court Reporter, do hereby
certify that the foregoing pages comprise a full, true, and
correct transcript of the proceedings had In the Matter of
Jenkins before Honorable Daniel Patrick O'Brien in Pontiac,
Michigan on September 25, 2007.



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